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County Groundwater Regulation: Half a Governor's Commission Legacy Is Better than None

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I. INTRODUCTION

In 1977, three events converged to accelerate California's establishment of county groundwater regulation: the greatest drought in modern history, Inyo County's intense groundwater war against the City of Los Angeles, and Governor Jerry Brown's creation of his Commission to Review California Water Rights Law. The Governor's Commission concluded its work with a recommendation for mandatory state-supervised groundwater regulation at the local level.[1] The California Legislature ultimately rejected this model, failing to fill the void. Inyo County, despite its success in California Environmental Quality Act ("CEQA")[2] litigation against Los Angeles, had endorsed the Governor's Commission's recommendations, and their promise of state-mandated groundwater regulation in the Owens Valley, because litigation alone failed to provide Inyo with relief from unwise management of that basin. When the Legislature declined to occupy the field, Inyo County asserted a carefully-considered regulation of Los Angeles' Owens Valley pumping. In so doing, Inyo County laid the foundation for the 1994 judicial validation of county groundwater regulation.

While Inyo County, and this writer as its former special counsel, might consider this outcome a vindication of their efforts, county groundwater regulation can be deemed but half a fulfillment of the Governor's Commission's legacy. The California Legislature's rejection of the Commission's recommendations provided the legal and institutional impetus for local regulation where it did not exist before; but on the merits, rejection of state oversight remains rejection of the necessary mandate. The Legislature failed to provide the state with oversight that governs groundwater resources elsewhere in the West. County regulation, while commendably proving more effective and equitable than its critics predicted a generation ago, has not and cannot address the inherent connection between the state's surface water and groundwater. Nor have counties generally been endowed with the resources to produce refined regulation of complex extraction programs. Despite a quarter century of advocating for local regulation, this writer justifies that effort not on the conclusion that the Governor's Commission was

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1. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 170-71, 183-85 (Dec. 1978) [hereinafter FINAL REPORT].

2. CAL PUB. RES. CODE §§ 21000-21177 (West 1970 & Supp. 2004). CEQA requires all public agencies to prepare environmental impact reports on their projects that may "have a significant effect on the environment." CAL. PUB. RES. CODE §§ 21108, 21151 (West 1972).

wrong in calling for a comprehensive state program, but rather on the observation that the Legislature's rejection of the Commission's findings left local government with no other choice. California still needs state regulation of groundwater along the lines proposed by the Governor's Commission a quarter century ago.

II. THE 1977 DROUGHT INSPIRES RESPONSE IN THE OWENS VALLEY AND SACRAMENTO

In 1973, California's Third District Court of Appeal sustained Inyo County's claim that the newly-enacted CEQA statute required the City of Los Angeles to prepare an environmental impact report ("EIR") on its ongoing project of expanding groundwater pumping in the Owens Valley.[3] Three years later, Los Angeles produced its first EIR, which the court agreed to review for adequacy.[4] At the same time, the appellate tribunal (which had asserted original jurisdiction over the case in 1973) limited Los Angeles' pumping to an annual rate that balance the needs of the Owens Valley environment with water demands in Los Angeles.[5] In Inyo County's view, the leniency of the pre-1976 pumping restrictions explained why Los Angeles took three years to prepare an EIR, one that turned out to be grossly inadequate.[6]

The court's 1976 pumping rate, similar to that previously installed by the superior court acting as referee, did not seriously impair Los Angeles' operations until the drought, which began in 1976, became magnified in the winter of 1977. In February 1977, Los Angeles asked the Court of Appeal to lift the injunction, thereby giving the city full access to the Owens Valley groundwater basin.[7] Inyo responded that Article X, Section 2 of the California Constitution required conservation as the first line of defense to a drought.[8] The court agreed with Inyo, stating that a temporary increase in Owens Valley groundwater pumping would only be authorized if Los Angeles first installed a meaningful conservation program.[9] Los Angeles complied by enacting the first mandatory water conservation

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3. County of Inyo v. Yorty (Inyo I), 108 Cal. Rptr. 377, 390 (Ct. App. 1973).

4. County of Inyo v. City of Los Angeles (Inyo II), 132 Cal. Rptr. 167, 169-70 (Ct. App. 1976).

5. *Id.* at 170-74.

6. *See* County of Inyo v. City of Los Angeles (Inyo III), 139 Cal. Rptr. 396 (Ct. App. 1977).

7. Preliminary Memorandum re Motion for Modification of Interim Pumping Rate at 1-2, County of Inyo v. City of Los Angeles, No. 3 Civ. 13886 (Cal. Ct. App. Mar. 24, 1977) (copy on file with the *McGeorge Law Review*).

8. *See id.* at 3.

9. *Id.* at 4. The court stated:

> In relation to the state's current water crisis, the effort at voluntary conservation is inadequate to justify the requested relief. The California Constitution (Article X, Section 2) abjures the waste of water and seeks its conservation in the interest of the state's entire population. . . . When the state's water resources dwindle, the constitutional demands grow more stringent and compelling, to the end that scarcity and personal sacrifice be shared as widely as possible among the state's inhabitants. . . . Unless and until the municipal government of Los Angeles installs and

ordinance in its history.[10] This ordinance was an early legacy of the 1977 drought, Inyo's nonproprietary constitutional claims, and the court's enforcement of them.

Barely a week after Los Angeles' mandatory conservation program took effect in June 1997, the Court of Appeal rejected the city's EIR for failing to describe the groundwater project honestly, and consequently failing to examine water conservation as an alternative to increased Owens Valley groundwater pumping.[11] Thus, in the early summer of 1977, Inyo's position was vindicated in both law and practical application. However, the county's victory was in a physical sense short-lived. Two months after the court harshly condemned the city's CEQA abuses, Los Angeles convinced the court to allow maximum groundwater pumping. The court allowed this escape, even though Los Angeles could still draw through the Metropolitan Water District ("MWD") from then-ample Colorado River supplies, and other MWD communities had successfully resisted mandatory conservation.[12]

When the Governor's Commission began its work in mid-1977, the County of Inyo was prepared to endorse the direct regulation of Los Angeles' groundwater extraction as preferable to regulation by judicial decree. At that time, Inyo assumed (erroneously, as shown below) that attempting its own regulation of Los Angeles would likely prove futile, given the fact that traditional water law generally recognized the state's primary role in regulation and also protected Los Angeles as both a property owner and a municipality. Moreover, Inyo feared that Los Angeles would escape meaningful judicial administration in one of two ways: first, by writing an adequate EIR that earned discharge of the Court of Appeal's mandate; or second, by stonewalling with another inadequate effort in the expectation that, when supplies returned to normal, the court's relatively generous and uniform pumping limitation would provide no restraint and no protection to the valley's environment.[13]

Direct legislative regulation of Los Angeles, in contrast, could produce refined restrictions that reflect particular conditions in the Owens Valley. Most importantly, in place of Inyo County having to gather evidence and convince a distant appellate tribunal (that had already shown extraordinary generosity of its limited resources to govern from afar), direct regulation would place the burden

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> implements methods which are predictably capable of achieving substantial water savings and demonstrates a need for water rather than rate preservation, its motion for leave to extract additional underground water from the Owens Valley is not likely to achieve success.

Id. at 3-4.

10. *See* Antonio Rossmann & Michael J. Steel, *Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights*, 33 HASTINGS L.J. 903, 919 n.106 (citing to Los Angeles, Cal., Ordinance 149,700 (May 12, 1977); Remi Nadeau, *Los Angeles: A City That Water Built*, L.A. TIMES, June 26, 1977, § VII, at 1.

11. *Inyo III*, 139 Cal. Rptr. at 402-08.

12. *See* Answer to Petition for Hearing, County of Inyo v. City of Los Angeles, No. 3 Civ. 13886 (Cal. Nov. 18, 1981) (copy on file with the *McGeorge Law Review*); Rossmann & Steel, *supra* note 10, at 919 n.106, 919-20 (1982); *L.A. Wins Water Case: Fear Eased Here for Rationing*, SAN DIEGO UNION, July 28, 1977, § II, at 1.

13. Rossmann & Steel, *supra* note 10, at 924-25.

of proof on Los Angeles, and place the substantive decision in the hands of those at home with the resources and expertise to provide refined regulation.[14]

Thus, Inyo County became one of only two local entities in the entire state to endorse the Governor's Commission's recommendations for state-supervised and locally-based groundwater regulation.[15] The Owens Valley Groundwater Basin, under the Commission's proposal, would be governed by a consortium of local entities that, in Inyo's view, would include Los Angeles, Inyo, and other local agencies.[16] In the course of advocating before the Commission, Inyo shaped the proposal to ensure that regulation would be justified, not just for traditional reasons such as overdraft or land subsidence, but also to prevent "other significant environmental degradation" produced by groundwater pumping—in the case of Owens Valley, the observed desiccation of the valley floor and loss of native vegetation caused by lowering of the shallow water table in a desert environment.[17]

Despite the heroic efforts of legislators and advocates supporting the Governor's Commission's recommendation, the proposed measures to enact the Commission's recommendations failed in 1979.[18] Opposition featured the joinder of urban water agencies and agricultural interests.[19] While divided on so many issues, these two groups could agree on one thing: the state's answer did not lie in regulation of groundwater, but in development of new supplies to supplement that depleted resource.[20]

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14. *Id.*

15. *Id.* at 928 n.150; Carol Benfell, *Inyo County Takes Fight Over Water to State*, L.A. DAILY J., Sept. 28, 1978, at 1; Letter from Antonio Rossmann, Special Counsel to the County of Inyo, to Members of the Governor's Commission to Review California Water Rights Law 4-5 (Sept. 28, 1978) (on file with the *McGeorge Law Review*) [hereinafter Inyo Letter].

16. *See* Rossmann & Steel, *supra* note 10, at 927.

17. *See id.* at 928; Inyo Letter, *supra* note 15, at 5-7. *Compare* GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, DRAFT REPORT 217 (Aug. 1978) [hereinafter DRAFT REPORT], *with* FINAL REPORT, *supra* note 1, at 209 (adding "other significant environmental degradation" to the purposes for limiting extraction).

18. Senate Bill 47 failed on January 30, 1980. *See* SENATE FINAL HISTORY, 1979-1980 Reg. Sess., at 41 (Cal. 1980). Assembly Bill 442 also failed on January 30, 1980. *See* ASSEMBLY FINAL HISTORY, 1979-80 Reg. Sess., at 334 (Cal. 1980). Both bills provided for legislative designation of areas in need of a comprehensive groundwater management program and for local control over such programs.

19. *See* COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, GROUND WATER OVERDRAFTING MUST BE CONTROLLED 13 (Pub. No. CED-80-96, Sept. 12, 1980); W.B. Rood, *Panel Kills Bill on Water Saving*, L.A. TIMES, Aug. 26, 1980, § 1, at 3, 21 (stating that the "bill was opposed by agricultural interests, who are against any semblance of state supervision on the use of underground water supplies, and the Metropolitan Water District of Southern California, which contended the measure was ill-conceived and hastily drafted").

20. Statement from the Association of California Water Agencies, Agricultural Council of California, California Cattlemens' Association, California Chamber of Commerce & California Farm Bureau Federation (Jan. 24, 1979) (on file with the *McGeorge Law Review*).

III. INYO COUNTY ADOPTS ITS 1980 GROUNDWATER ORDINANCE

In 1978, Los Angeles issued its second draft EIR, purporting to address the deficiencies assigned in the Court of Appeal's 1977 decision.[21] Inyo saw the EIR as producing yet another artificially-defined project, one that promised more water to the valley and to Los Angeles than was available, with the "real" water destined for Los Angeles. In Inyo's perspective, Los Angeles was stalling yet again, forcing the county to maintain its litigation that, in the end, would only produce another set-aside and judicial order to try again. That observation in itself motivated Inyo to pursue a more direct path toward restraint on groundwater extraction. But the county was also motivated by the Governor's Commission's work in two respects: first, suggestions within Commission reports that the state had not to date occupied the field of groundwater regulation;[22] and second, the likelihood that the Legislature would not expressly occupy the field by adopting the Commission's recommendations.

This writer thus undertook on behalf of Inyo County a survey of all California legislation to determine whether groundwater had been a subject of any claim of preemption, and an estimate of what, if any, local regulation would prove legally tolerable.[23] In late-1978, the results of this writer's survey were reported to the Inyo County Board of Supervisors, concluding that neither general nor district California water law disabled the county from regulating the resource, and that Los Angeles, as a charter city, could not assert an exemption from such regulation.[24] Acting on this recommendation, the Inyo supervisors commissioned a planning firm and this writer to produce a proposed Inyo County Groundwater Ordinance,[25] which was placed before the voters at the November 1980 general election for adoption by referendum. The measure passed overwhelmingly.[26]

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21. *See* County of Inyo v. City of Los Angeles (Inyo V), 177 Cal. Rptr. 479 (Ct. App. 1981) (concluding that the EIR was inadequate).

22. *See* FINAL REPORT, *supra* note 1, at 136; DRAFT REPORT, *supra* note 17, at 141; ANNE J. SCHNEIDER, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, GROUNDWATER RIGHTS IN CALIFORNIA 94 (Staff Paper No. 2, July 1977).

23. *See* Memorandum, Regulation of Groundwater Extraction by Inyo County, from Antonio Rossmann, Special Counsel to Inyo County, to the Inyo County Board of Supervisors (July 24, 1978) (on file with the *McGeorge Law Review*).

24. *See id.*

25. Inyo County Board of Supervisors, Board Meeting Minutes 3 (Nov. 27, 1979). The California Resources Agency and Department of Water Resources provided technical assistance to the county's consultants. The Resources Agency concluded, ironically, that "[i]f all counties and local water agencies were to take the lead in establishing such ordinances and management programs, there would be no need for the call now heard in Sacramento for a state-mandated groundwater program." Letter from Richard E. Hammond, Deputy Secretary for Resources, to Mr. V.E. "Johnny" Johnson, Chairman, Inyo County Board of Supervisors (June 6, 1980) (on file with the *McGeorge Law Review*).

26. JOHN WALTON, WESTERN TIMES AND WATER WARS: STATE, CULTURE, AND REBELLION IN CALIFORNIA 263 (1992).

Inyo's ordinance was not the first local groundwater measure enacted in California; however, it did aspire to be the first comprehensive one. The county knew that its pioneer colleagues in Imperial and Butte Counties had addressed ambitions on local supplies by completely prohibiting the export of groundwater beyond county boundaries.[27] Inyo was also aware that these measures, however well-intentioned and appropriate in basins that were fully developed for local agricultural use, had been politically condemned as hoarding and legally vulnerable to the charge that they violated the Article X, Section 2 requirement that all the state's water resources be devoted to reasonable use. A flat prohibition on exportation would also represent a dramatic deviation from the common law, which allowed export from a basin once the basin's reasonable overlying needs were met.[28] A total prohibition of groundwater export from the Owens Valley to Los Angeles would surely not stand up either in the Legislature or the California Supreme Court.

Moreover, Inyo did not really aspire to a total prohibition, but instead acted on the premise, now vindicated in fact, that by breaking Los Angeles' monopoly on governance of the Owens basin, the county could provide groundwater to improve the valley environment and also serve increased needs in Los Angeles. The county's perspective was informed by the hydrological study it had commissioned to respond to Los Angeles' second draft EIR in 1978, which demonstrated that in contrast to the simplistic approach of the city, more refined management could avoid drawdown of the shallow groundwater basin and still provide ample water to Los Angeles in non-critical years.[29]

Inyo also realized in 1979 that its fear of ineffective judicial governance had become reality. Claiming that the city was once again stonewalling its CEQA compliance because the court's modest pumping restrictions provided no motivation for that compliance, the county asked the court to install the stringent rate it had sought in 1976.[30] Although the court in 1981 rejected the second EIR as forcefully as it had the first,[31] in the preceding two years of judicial review it left the pumping rate undisturbed.[32]

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27. *See* Butte County, Cal., Ordinance 1859 (Aug. 23, 1977); IMPERIAL COUNTY, CAL., CODIFIED ORDINANCES §§ 56200-56215 (1972).

28. *See* Katz v. Walkinshaw, 74 P. 766 (Cal. 1903).

29. *See generally* Rossmann & Steel, *supra* note 10 (citing to P.B. WILLIAMS, CHANGES IN THE OWENS VALLEY SHALLOW GROUNDWATER LEVELS FROM 1970 TO 1978 (1978)).

30. County of Inyo v. City of Los Angeles (Inyo V), 177 Cal. Rptr. 479 (Ct. App. 1981).

31. *Id.* at 487.

32. *See* Rossmann & Steel, *supra* note 10, at 925 n.129. On losing the 1981 CEQA case, *Inyo V*, Los Angeles' attorney asserted that "[e]ven if the plan were to be approved [by the court], the city would not pump more." Alan Ashby, *L.A. Dealt Setback On Plans for Water from Owens Valley*, L.A. DAILY J., Oct. 5, 1981, at 1. Only in 1984, to secure Los Angeles' CEQA compliance in the event that joint management with Inyo broke down, did the court provide that the rate Inyo sought in 1976 would be imposed. County of Inyo v. City of Los Angeles (Inyo VI), 207 Cal. Rptr. 425, 430 (Ct. App. 1984).

The Inyo ordinance was grounded in the county's need to implement Article X, Section 2, and the area-of-origin principle that watersheds with no other sources of supply must not be deprived of their own needs by export to areas with other resources or alternatives available.[33] The measure did just that by tracking the common law authorizing export outside the basin when such export could be proven by the exporter to not cause harm within the basin.[34] No flat prohibition on export is installed, and governance is measured not at the political border of the county line, but at the hydrologic border of the basin.[35] At the same time, before authorizing extraction, the ordinance required a determination that extractors lack other less-damaging sources of water, including the environmentally-favorable alternative of conservation.[36]

In order to execute this policy, the ordinance called for creation of a groundwater management plan that would build upon the 1978 hydrologic study.[37] By analogy to land-use planning, the ordinance created a county water commission charged with preparing the plan for ultimate adoption by the County Board of Supervisors.[38] Once adopted, annual extraction permits under the ordinance would be issued by the commission, and appeal to the supervisors would be available.[39]

The ordinance exempted the need for commission approval of those overlying domestic uses of less than five acre-feet annually, and agricultural uses on parcels of less than twenty acres, which were deemed categorically harmless within the large basin.[40] While the ordinance has been criticized since the time of its enactment as being aimed at only Los Angeles,[41] that charge was belied by the fact that at least *two* cities that pumped water for their inhabitants from the Owens Valley basin on lands they owned in the unincorporated county would be regulated: Bishop and Los Angeles.[42]

The legality of the Inyo groundwater ordinance has never been finally determined. Los Angeles unsuccessfully attempted to prevent the Inyo voters from enacting the measure by referendum[43] and, after the election, demanded that

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33. INYO COUNTY, CAL., CODE § 7.01.010 (1980). The ordinance, entitled "An Ordinance to Regulate the Extraction of Groundwater within the Owens Valley Groundwater Basin," appears as chapter 7.01 of the Inyo County Code, and is reprinted in Rossmann & Steel, *supra* note 10, at 951-57.

34. INYO COUNTY, CAL., CODE § 7.01.030.

35. *Id.* § 7.01.020(g).

36. *Id.* § 7.01.030(g).

37. *Id.* § 7.01.030.

38. *Id.* §§ 7.01.030-.031.

39. *Id.* § 7.01.043.

40. *Id.* § 7.01.070.

41. *See, e.g.*, Gregory S. Weber, *Twenty Years of Local Groundwater Export Legislation in California: Lessons from a Patchwork Quilt*, 34 NAT. RESOURCES J. 657, 725 (1994).

42. Rossmann & Steel, *supra* note 10, at 943.

43. *See* City of Los Angeles v. County of Inyo, No. 4 Civ. 25014, *writ denied* (Cal. Ct. App. Sept. 25, 1980), *hearing denied* (Cal. Oct. 22, 1980); Rossmann & Steel, *supra* note 10, at 930 n.159; *Court Refuses to Block Inyo Vote on L.A. Water Priority*, L.A. TIMES, Oct. 24, 1980 (stating that the California Supreme Court denied Los Angeles' request for a hearing).

the voters' approval be set aside on the ground that the action of voting itself required an EIR.[44] Los Angeles then launched its substantive challenge, asserting that the ordinance is preempted by state law, interferes with the municipal affairs of Los Angeles, and singles out Los Angeles for unequal treatment.[45]

In a ruling issued on July 8, 1983, a visiting judge sitting on the Inyo County Superior Court sustained Los Angeles' preemption claim.[46] At the hearing on these claims, the judge expressed his view that only the Legislature could address the Owens Valley basin's problems.[47] Previously (in overruling the county's demurrer to Los Angeles' complaint), the judge had cautioned Los Angeles not to push its prerogative in the absence of such state regulation, lest new law be made to the city's disadvantage.[48] After the hearing, the county announced its intention to take a direct appeal to the California Supreme Court once the superior court decision became final.

That finality never came. Instead, Inyo proposed that the parties stipulate to stay finality while the county and city explore a form of settlement to their CEQA dispute, which was still pending in the Third District Court of Appeal. Under the aegis of the California Attorney General, the city and county conducted initial discussions pointing toward a truce in that litigation.[49] Although these negotiations initially stalled, they were re-prompted when the California Supreme Court's dramatic February 1983 ruling against Los Angeles in the Mono Lake case[50] enabled Los Angeles civic and political leaders to convince its Department of Water and Power to follow a new strategy other than litigation.[51] Ultimately, the ordinance litigation was stayed to prevent a "winner take all" outcome in the California Supreme Court.[52]

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44. *See* City of Los Angeles v. Bd. of Supervisors, No. 12883 (Super. Ct. Inyo County Dec. 30, 1980), *writ denied* (May 11, 1981 & July 2, 1981); WALTON, *supra* note 26, at 264; Rossmann & Steel, *supra* note 10, at 933 n.185.

45. *See* City of Los Angeles v. Bd. of Supervisors, No. 12908 (Super. Ct. Inyo County Jan. 16, 1981); WALTON, *supra* note 26, at 264; Rossmann & Steel, *supra* note 10, at 933 n.185.

46. *See* City of Los Angeles v. Bd. of Supervisors, No. 12908, at 5 (Super. Ct. Inyo County July 8, 1983) (Ruling on Motion for Summary Judgment and Judgment on the Pleadings) (copy on file with the *McGeorge Law Review*).

47. *See id.* at 3-4; City of Los Angeles v. Bd. of Supervisors, No. 12908, at 26 (Super. Ct. Inyo County Apr. 30, 1984) (Transcript of Proceedings), *quoted in* Ralph E. Shaffer, *A "Kinder, Gentler" Los Angeles?: The City and Inyo-Mono Water, 1970-1991*, 83 S. CAL. Q. 81, 94 (2001).

48. *See* City of Los Angeles v. Bd. of Supervisors, No. 12908, at 18 (Super. Ct. Inyo County Sept. 11, 1981) (Transcript of Oral Proceedings), *quoted in* Shaffer, *supra* note 47, at 96. The county unsuccessfully sought mandate to sustain its demurrer. County of Inyo v. Superior Court, No. 4 Civ. 27374, *writ denied* (Cal. Ct. App. Nov. 23, 1981).

49. *See* WALTON, *supra* note 26, at 268-69.

50. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

51. WALTON, *supra* note 26, at 269-70.

52. *Id.* at 270.

Thus, with respect to Inyo County's Owens Valley Groundwater Ordinance, final adverse judgment was never entered.[53] Inyo instead stipulated that it would not enforce the ordinance against Los Angeles, except to allow the county water commission to continue its existence to participate in formulation of a substitute plan.[54] That plan first emerged as an interim city-county management of the groundwater basin, which the Sacramento-based Court of Appeal in 1984 allowed the parties to substitute for its own uniform pumping rate installed eight years before.[55] Ultimately, Inyo and Los Angeles prepared a joint EIR on their long-term joint water management plan, which became effective in 1997 when the Court of Appeal discharged the CEQA claim.[56] By agreement of the parties, that long-term plan, together with a permanent injunction against application of the Inyo ordinance, became the stipulated non-final judgment of the Inyo County Superior Court that had initially intended to invalidate the groundwater ordinance fifteen years before.[57]

Today, Inyo and Los Angeles jointly govern Owens Valley groundwater pumping and related surface supplies pursuant to their joint water management plan.

IV. *BALDWIN V. TEHAMA* SUSTAINS COUNTY GROUNDWATER REGULATION

As part of their peace first reached in 1984, Los Angeles and Inyo County agreed that neither would take steps in either the Legislature or the courts to advance their competing claims about the legality of county groundwater regulation.[58] So powerful was this principle that Governor George Deukmejian vetoed a 1986 bill that had been amended, without notice, to undercut local groundwater regulation in the Owens Valley.[59] The validity of such regulation was determined by other parties.

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53. Russell Kletzing, *Imported Groundwater Banking: The Kern Water Bank—A Case Study*, 19 PAC. L.J. 1225, 1262 (1988).

54. *See* City of Los Angeles v. Bd. of Supervisors, No. 12908 (Super. Ct. Inyo County Apr. 18, 1984) (Stipulation).

55. County of Inyo v. City of Los Angeles (Inyo VI), 207 Cal. Rptr. 425, 428-29 (Ct. App. 1984).

56. County of Inyo v. City of Los Angeles, No. 3 Civ. C004068 (Cal. Ct. App. filed May 23, 1997) (Order Granting Motion for Discharge of Peremptory Writ of Mandate) (copy on file with the *McGeorge Law Review*). The entire order reads as follows, "Good cause appearing therefor, the peremptory writ of mandate issued August 6, 1973, is discharged." *See also An Old Water War Dries Up*, L.A. TIMES, May 28, 1997, at B6. The legacy of *Inyo v. Los Angeles* is reviewed in Antonio Rossmann, *The 25-Year Legacy of Friends of Mammoth*, 21 ENVIRONS 63, 67-70 (1998).

57. *See* City of Los Angeles v. Bd. of Supervisors, No. 12908 (Super. Ct. Inyo County June 13, 1997) (Stipulation and Order for Judgment) (approving of the October 18, 1991 stipulation by court order).

58. *See* City of Los Angeles v. Bd. of Supervisors, No. 12908 (Super. Ct. Inyo County Apr. 18, 1984) (Stipulation).

59. A.B. 3567, 1983-1984 Reg. Sess. (Cal. 1984) (vetoed on Sept. 26, 1984). *See* A.B. 3567 Veto Message, Office of the Governor, at 2-3 (Release No. 584, Sept. 26, 1984).

Those parties turned out to be George Baldwin and the County of Tehama. Tehama was one of the northern Sacramento Valley counties that had enacted a prohibition on out-of-county groundwater export.[60] Farmer Baldwin wanted to draw groundwater from his land in Tehama, place it in an irrigation canal, and use it on lands downstream in Glenn County.[61] He challenged Tehama's ordinance as both being a violation of Article X, Section 2 and as being preempted by state law.[62] The trial court enjoined the ordinance as being preempted.[63] Tehama appealed to the Third District Court of Appeal; Baldwin did not cross appeal the denial of his unreasonable use claim.[64] Therefore, the sole issue for decision was state preemption of the local groundwater regulation.[65]

Baldwin v. Tehama enjoyed *amici curiae* briefs.[66] Baldwin was supported by Professor Gregory Weber, who had written the most comprehensive articles assessing California county groundwater regulation and concluded that necessity compelled the state to occupy the field.[67] Tehama was supported by several other rural counties whose brief was authored by this writer, based on his 1983 article defending the validity of the Inyo County ordinance.[68] Citing both authors and their works, the Court of Appeal ruled that the Legislature had neither expressly nor impliedly occupied the field of groundwater regulation, and sustained the Tehama ordinance against the preemption claim.[69]

Contrary to subsequent assessments, including those in official state publications, the *Tehama* court did not rule that the county's export ordinance was constitutional under Article X, Section 2. The court did, however, make two important observations that will guide resolution of future Article X, Section 2 claims. First, challengers to export restrictions should not presuppose that their claims against local efforts to preserve their local supply for local consumption will not be defeated by principles of area-of-origin protection.[70] Second, if a future conflict emerges between county groundwater regulation and that provided

60. Baldwin v. County of Tehama, 36 Cal. Rptr. 2d 886, 889 (Ct. App. 1994).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 888-89.

65. *Id.*

66. *Id.*

67. *Id.* at 888; *see* Gregory S. Weber, *Forging a More Coherent Groundwater Policy in California: State & Federal Constitutional Law Challenges to Local Groundwater Export Restrictions*, 34 SANTA CLARA L. REV. 373 (1994); Weber, *supra* note 41. It is a source of pride and collegiality that Professor Weber was this writer's student in water law at Hastings College of the Law.

68. *Baldwin*, 36 Cal. Rptr. 2d at 889; *see generally* Rossmann & Steel, *supra* note 10.

69. *See generally Baldwin*, 36 Cal. Rptr. 2d at 891-95. Significantly, the court held that "preemption cannot be accomplished by a statute which merely declares that a field is preempted. The Legislature may not preempt the exercise of the police power negatively, merely by forbidding its exercise." *Id.* at 891. Thus, the Legislature either must affirmatively address the problem, or else counties and cities are empowered to do so.

70. *Id.* at 897 n.14.

(or prohibited) by other local entities forming an A.B. 3030 district,[71] the county regulation will be protected as the most democratically-based and accountable.[72]

Baldwin sought review in the California Supreme Court, arguing that the ordinance is preempted under the conventional California doctrine that inquires of express or implied occupation of the field of regulation. Baldwin did not propose to the court a new model of preemption analysis to address the singular subject of California water resources. The petition was denied with only two votes in favor of granting it, one of them being that of Justice Stanley Mosk.[73] While there is no question that every California court except the California Supreme Court is bound by *Tehama*'s authorization of county groundwater regulation, in this writer's view, Justice Mosk's vote signifies sympathy for an argument that, should county governments prove themselves incapable of regulating groundwater fairly and with statewide considerations in mind, the nature of the water resource requires that both surface and groundwater be regulated in coordination by the state. To its credit, in the absence of a pattern of abuse by counties, the Third District Court of Appeal refused to leave the field totally unregulated just because of the Legislature's unwillingness to govern.

V. MORE COUNTIES ADOPT GROUNDWATER ORDINANCES

The years since *Tehama* have naturally seen more counties enter the field of groundwater regulation. The variety of these ordinances bears out the Governor's Commission's premise that even state-supervised regulation be conducted at the local level, because of the great variety of local conditions and environments throughout California.[74]

To their credit, counties have generally shown themselves capable of governing fairly. Most new ordinances track the common law by restricting exports from groundwater basins and not categorically from the enacting county.[75] Rather than categorically prohibiting off-basin exports, counties have generally allowed for such exports conditioned on a permitting system that examines the more complex environmental challenges that export proposals create.[76] Two counties in particular have produced state-of-the-art refined ordinances. Glenn County requires the adoption of groundwater basin objectives before a basin can be regulated.[77] This

71. 1992 Cal. Stat. ch. 947.

72. *Baldwin*, 36 Cal. Rptr. 2d at 895 (stating that "[s]ince many of these [A.B. 3030] agencies are not municipalities and have no reservoir of police power, they are limited to powers specifically conferred by statute"). The supremacy of county regulation over A.B. 3030 regulation becomes important in light of some A.B. 3030 plans that the agencies adopted to deny regulation, not to regulate.

73. *Id.* at 897.

74. FINAL REPORT, *supra* note 1, at 166-68.

75. *See, e.g.*, SISKIYOU, CAL., CODE tit. 3, ch. 13 (1998); *see also* Antonio Rossmann, *Groundwater Regulation After* Baldwin vs. County of Tehama, CALIFORNIA COUNTY, Mar./Apr. 1996, at 31.

76. *See, e.g.*, SISKIYOU, CAL., CODE tit. 3, ch. 13 (1998).

77. DEP'T OF WATER RES., CALIFORNIA'S GROUNDWATER UPDATE 2003 at 36, 38 (Bulletin 118).

model has been cited as exemplary in the Department of Water Resources' recent update of Bulletin 118.[78] Napa County, following its popular initiative that future residential and commercial development be strictly confined to that which the environment can bear,[79] adopted a groundwater ordinance that expressly connects land-use and groundwater regulation.[80]

At least two recent ordinances, however, have reached the frontiers of valid regulation and offer tentative proof that the state-supervised regulation called for by the Governor's Commission is still needed. Fresno County faced a unique challenge. The land comprised of one of its local water districts and Central Valley Project ("CVP") contractors was purchased by a developer of subdivisions near Tracy. The contractor proposed to transfer all of its CVP entitlement to its Tracy lands and to commence pumping from an overdrafted groundwater basin to compensate for the transferred surface supplies. As a consequence, Fresno enacted an ordinance regulating such groundwater extraction when being conducted to substitute for the transfer of surface water.[81] Yolo County had anticipated this same challenge and enacted a similar measure four years earlier.[82]

While these ordinances are facially valid, they remain vulnerable to a charge that they are seeking indirectly to govern the transfer of surface water supplies, an activity unambiguously regulated by the state. But as the Court of Appeal adjudicating the Owens Valley groundwater dispute recognized in establishing its 1976 pumping rate, effective governance of groundwater also requires restriction on related changes in surface supplies.[83] While the Fresno County and Yolo County ordinances should survive legal challenge today (to date the mere enactment of the Fresno ordinance led to abandonment of the proposed substitution of groundwater for surface water in the local CVP contracting district), the situation is bound to arise where a county will find itself incapable of rational groundwater regulation because of its inability to restrict surface water practices.

The converse is also true, a circumstance recently addressed by Professor Joseph Sax in responding to his commission from the State Water Resources Control Board ("SWRCB") to assess the law of state board jurisdiction over groundwater that influences surface supplies.[84] Despite Professor Sax's cogent analysis, including his discovery of the transcripts of the Governor's Commission's 1913 predecessors addressing this very problem, the SWRCB two years ago rejected Sax's advice that it regulate any groundwater practice that frustrates the SWRCB's regulation of surface water. The SWRCB (responding to the complaints of the California water industry)

78. *Id.*

79. *See* DeVita v. County of Napa, 889 P.2d 1019 (Cal. 1995).

80. NAPA, CAL., CODE ch. 13.15; *see also id.* §§ 18.124.060, 18.124.070.

81. FRESNO, CAL., CODE ch. 14.03 (2000).

82. YOLO, CAL., CODE tit. 10, ch. 7 (1996).

83. County of Inyo v. City of Los Angeles (Inyo II), 132 Cal. Rptr. 167, 172-73 (Ct. App. 1976).

84. JOSEPH L. SAX, REVIEW OF THE LAWS ESTABLISHING THE SWRCB'S PERMITTING AUTHORITY OVER APPROPRIATIONS OF GROUNDWATER CLASSIFIED AS SUBTERRANEAN STREAMS AND THE SWRCB'S IMPLEMENTATION OF THOSE LAWS, FINAL REPORT (SWRCB No. 0-076-300-0, Jan. 19, 2002).

continues to insist that groundwater be shown to be flowing in "known and definite channels,"[85] ignoring legislative intent to redefine that ancient and ignorant common-law restriction.

Finally, effective county groundwater regulation is vulnerable to the high costs and technical expertise required in complex basin management. To date, with the exception of a few counties such as Napa, local authorities have not been called upon to apply a groundwater management plan to ambitious extractions; the enactment of an ordinance has in itself deterred the most challenging proposals. County regulation, though confirmed in law, remains largely untested in reality.

Ironically, perhaps the most successful county regulation has been accomplished by Inyo County, whose ordinance remains, by consent, enjoined.[86] By negotiating that currency for joint Inyo-Los Angeles management of the Owens Valley groundwater basin and related surface supplies, and securing funding from Los Angeles and state and federal sources for that purpose, Inyo County has largely attained the ends that motivated its daring support of the Governor's Commission proposal a generation ago—and produced a model of regulation that nearly tracks that which the Commission advanced.

VI. CONCLUSION

Proprietary groundwater interests, both agricultural and urban, have in the quarter century since completion of the Governor's Commission's work effectively advocated for a denial of state-supervised groundwater regulation. The Legislature, while steadfastly tolerating local regulation, has lacked the resolve to recognize and empower the state as best equipped to regulate California's inherently connected water resources. In the absence of legislative leadership, the *Tehama* court and the counties that have legislated in expectation of or reliance on that decision, have wisely and properly filled the void in groundwater regulation. Hopefully, California counties will continue the difficult task, on extremely limited financial resources, of governing rationally at home and with empathy for their neighbors and the state's entire population—at least until our ever-increasing demands and ever-diminishing supplies compel the Legislature to act.

85. *E.g.*, S.W.R.C.B. Order No. WR 2003-04 (Feb. 19, 2003); *see* State Water Resources Control Board, Board Meeting Minutes, Item 7 (Feb. 19, 2003).

86. *See* discussion *supra* Part III.

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